Supreme Court, U.S.
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JOSEPH F. SPANIOL, JR.
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NO. 88-1037

IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1988

STATE OF ARIZONA,

Petitioner,

-vs-

HONORABLE DANIEL E. NASTRO, a judge of the Superior Court of the State of Arizona, in and for the County of Maricopa,

Respondent,

ELDEN GARDNER,

Real Party in Interest,

ON WRIT OF CERTIORARI TO THE
ARIZONA SUPREME COURT

REPLY TO BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Question Presented

When the defendant is white and his attorney is black, does the Sixth Amendment right to an impartial jury and Batson v. Kentucky, require a prosecutor to explain his peremptory strikes of the only two black veniremen?

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ARGUMENTS

I

AN IDENTICAL OR SIMILAR QUESTION IS PENDING BEFORE THIS COURT.

Petitioner submitted that this Court is presently considering an identical or similar issue of whether the Sixth Amendment right to a trial by an impartial jury compels explanation of peremptory challenges that exclude a distinctive group. Teague v. Lane, 820 F.2d 832 (7th Cir. 1987), cert. granted, ____U.S.____, 108 S.Ct. 1106 (Mar. 7, 1988) (Oct. Term, 1987, No. 87-5259). Respondent argues that Teague is not "identical," nor is it "similar." The precise question presented by Teague is "whether a prosecutor's use of peremptory challenges to exclude members of a distinctive group from the petit jury violates the Sixth Amendment fair cross-section requirement." (Appendix A at A-3; see

also Appendix B at B-3.) Since the Arizona Supreme Court held that the Sixth Amendment jury guarantee clause permits the trial court to compel explanations for the prosecutor's use of peremptory strikes, the issue is identical or similar. Petitioner does not contend that the issue is similar to the holding in the Arizona Court of Appeals opinion, which was limited to the issue of Batson v. Kentucky[1] and the equal protection clause of the Fourteen Amendment.

II

THERE IS A CONFLICT BETWEEN THE DECISIONS OF THE COURT OF APPEALS, AND THE HIGHEST STATE COURT WITH THE SAME TERRITORIAL JURISDICTION.

Respondent argues that there is no conflict between the Ninth Circuit and the Arizona opinions. While the Arizona Court of Appeals held that a Caucasian

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1. Batson v. Kentucky, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986).

has standing and can make a prima facie showing of discrimitory use of peremptory challenges with black veniremen, the Ninth Circuit clearly stated:

> Neither the Vaccaros nor Snider are black. Therefore, under Batson, they could not have made out a prima facie case of discrimination in jury selection in any event.

United States v. Vaccaro, 816 F.2d 443, 457 (9th Cir. 1987).

> The government argues that because it did not use its peremptory challenges to "remove from the venire members of the defendant's race," Chavez failed to establish a prima facie case of discrimination under Batson. We agree. . . . Chavez failed to satisfy these preliminary requirements because he did not show that the excluded jurors were members of his race.

United States v. Chavez-Vernaza, 844 F.2d 1368, 1376 (9th Cir. 1987) (citation omitted, emphasis added).

Finally, although the Arizona Supreme Court held that the Sixth Amendment

applies to the discriminatory use of peremptory challenges that exclude any substantial and identifiable class of citizens from the petit jury, 3 days later the Ninth Circuit held:

> [The sixth amendment] fair cross-section requirement applies only to the larger venire pool and not to the petit jury. . . . Nevius' sixth amendment claim therefore must fail because he does not allege discrimination in the selection of the venire.

Nevius v. Sumner, 852 F.2d 463, 466 (9th Cir. 1988).

CONCLUSION

There is an identical or similar issue of the Sixth Amendment jury guarantee clause pending before this Court in Teague v. Lane.

There are conflicts between the decisions of the Ninth Circuit and the highest state court with the same territorial jurisdiction. For all the

reasons set forth in the petition for writ of certiorari and those contained herein, the petitioner requests that this Court accept the petition for writ of certiorari and review the conjoined opinions of the Arizona Supreme Court and the Arizona Court of Appeals.

DATED this 9th day of February, 1989.

Respectfully submitted,

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A F F I D A V I T

STATE OF ARIZONA)
) ss.
COUNTY OF MARICOPA)

TIMOTHY C. HOLTZEN, a member of the Bar of this Court, being duly sworn upon oath, deposes and says:

That he served three copies of the Reply to Brief in Opposition to Petition for Writ of Certiorari, upon Carol Carrigan, Deputy Public Defender, 132 South Central, 2nd Floor, Phoenix, Arizona, 85004, attorney for Elden Gardner, by depositing the same in the United States Mail, with first class postage prepaid, return receipt requested.

Additionally, as a courtesy, he herewith certifies that service of three copies of this petition has been made upon the United States of America by depositing the same in the United States Mail, with first class postage prepaid, addressed to the Solicitor General, Department of Justice, Washington, D.C. 20530.

Additionally, as a courtesy, he herewith certifies that service of one copy of this petition has been made upon the Honorable Daniel E. Nastro, Judge of the Maricopa County Superior Court, 101 West Jefferson, #612, Phoenix, Arizona 85003-0000, by depositing the same in the United States Mail, with first class postage prepaid.

DATED this 9th day of February, 1989.

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SUBSCRIBED AND SWORN to before me this 9th day of February, 1989.

Marguerite A. Potter

MARGUERITE A. POTTER
NOTARY PUBLIC

My Commission Expires:

September 22, 1989

CRM86-0631
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APPENDIX A

No. 87-5259

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1987

FRANK DEAN TEAGUE,

Petitioner,

v.

MICHAEL LANE, Director,
Illinois Department of Corrections,
et al.

Respondents,

On Writ Of Certiorari To The United States
Court Of Appeals For the Seventh Circuit

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QUESTIONS PRESENTED FOR REVIEW

Whether a prosecutor's use of peremptory challenges to exclude members of a distinctive group from the petit jury violates the Sixth Amendment fair cross-section requirement.

Whether, consistent with Justice Harlan's view of retroactivity, Batson v. Kentucky should at a minimum be applied retroactively to all convictions not final when certiorari was denied in McCray v. New York.

Whether Swain v. Alabama permits the prosecution's volunteered reasons for its exercise of its peremptory challenges to be examined to determine if it has engaged in racial discrimination.

APPENDIX B

No. 87-5259

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1987

FRANK DEAN TEAGUE,

Petitioner,

vs.

MICHAEL LANE, Director
Department of Corrections, et al.,

Respondents.

On Writ Of Certiorari To The United States
Court Of Appeals For The Seventh Circuit

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QUESTIONS PRESENTED FOR REVIEW

1. Whether application of the representative cross-section principle to the petit jury so as to restrict the use of peremptory challenges is unworkable and unsound?

2. For purposes of the retroactivity doctrine, should the date of the announcement of a new rule of constitutional law be the controlling event, rather than some preceeding [sic] event, and is the retroactive application of the rule of Batson v. Kentucky to cases in which the conviction became final before the decision unwarranted?

3. Is petitioner barred by procedural default from pressing his argument that a violation of Swain v. Alabama is shown on the record in this case, and if not, does Swain permit the use of peremptory

challenges to excuse members of a cognizable racial group for trial-related reasons in an individual case where the defendant is a member of the group?

"